COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

ADAMS ROAD TRUST,

v.

GRAFTON BOARD OF APPEALS

No. 02-38

DECISION

December 10, 2004

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HOUSING APPEALS COMMITTEE

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DECISION

This is an appeal, pursuant to G.L. c. 40B, § 20-23, brought by Adams Road Trust (Trust), from a decision of the Grafton Zoning Board of Appeals, granting a Comprehensive Permit with conditions for 56 units of mixed income single family housing under the FHLBB NEF on a 76.58 acre site located at 68, 70, and 72 Adams Road in Grafton, Massachusetts. The Board reduced the number of units from the requested 76 to 56, alleging that this reduction in units, as well as the denial of connection to Town water and adherence to local zoning for lot size and frontage, are necessary based on local planning as defined in the Town's Comprehensive Plan, in order to preserve the rural setting of this area of Town and to provide for open space and recreation.

The Board failed to show that the decrease in the number of units and requiring strict adherence to lot size and frontage are in keeping with the intent of the Comprehensive Plan. However, based on the evidence provided in the hearing, the Board established that extending the

Therefore, the Trust may construct up to 75 units of single family housing as a clustered development as defined on its proposed plan, but it must do so while complying with Title 5 of the State Environmental Code, 310 CMR 15.00 (Title 5) and 310 CMR 15.216(2).

I. PROCEDURAL HISTORY

On November 29, 2000, the Trust submitted an application to the Board for a 456-unit condominium project. The application was subsequently revised in March of 2001 to a 254-unit condominium project. The project was again revised on July 18, 2001, resulting in the final proposal of 76 single-family homes to be built on separate lots, of which 19 would be offered as affordable units.[1] The Board opened a duly noticed public hearing on December 14, 2000, and continued the hearing for 30 sessions over two years, finally closing on November 14, 2002. The Board voted 3 - 1 on December 24, 2002, to grant a permit subject to sixty-seven conditions and limiting the project to the construction of 56 single-family units.

The Trust appealed the permit as conditioned to the Housing Appeals Committee on December 30, 2002, alleging that the reduction in the number of units, combined with eight of the conditions, and the Board's failure to grant two of the requested waivers, rendered the project uneconomic. On January 24, 2003, an abutter moved to intervene in the proceedings pursuant to 760 CMR 30.04(2). On April 17, 2003, ten citizens moved to intervene pursuant to G.L. c. 30A, § 10A.

evidence, counsel submitted post-hearing briefs, with the Board and the proposed interveners submitting a single brief reflecting their combined interests (Joint Post-Hearing Brief).

A. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee, three jurisdictional requirements must be met. The project must be fundable under an affordable housing program, the developer must be a limited dividend organization, and it must control the site. 760 CMR 31.01(1). The parties stipulate that the Trust is a limited dividend organization, that the project is fundable under the New England Fund, and that the Trust controls the project site. Pre-Hearing Order, § I-8, I-9, I-10. In addition, the Board stipulated that the Town of Grafton has not satisfied any of the statutory minima defined in G.L. c. 40B, § 20, thus foreclosing the defense that its decision is consistent with local needs as a matter of law pursuant to that section. Pre-Hearing Order, § I-7.

B. Motion to Intervene

Two separate motions to intervene were filed in the current case. No rulings on these motions were made during the hearing, but the movants were granted the status of *amici curiae*, and, through counsel, were permitted to participate fully in the hearing, examining witnesses, presenting argument, presenting their own witness, and submitting a post-hearing brief.

An administrative agency has broad discretion to grant or deny intervention. *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 346, 757 N.E.2d 1104, 1109 (2001). It is not

may even be extensive if there are special circumstances to provide justification. See *Boston Edison Co. v. Dept. of Public Utilities*, 375 Mass. 1, 45-46, 375 N.E.2d 305, 332, cert. den. 439 U.S. 921 (1978).

Our standards for intervention are set out in 760 CMR 30.04 and require a showing that the intervener may be substantially and specifically affected by the proceedings. As is clear from the commentary in the regulation, this requires a showing "that their harm would be related to the granting of relief from local regulations as requested by the developer in this appeal, that their harm is not a common harm which is shared by the all the residents of the Town, and that the Board will not diligently represent those interests." *Weston Development Group v. Hopkinton*, No. 00-05, slip op. at 6-7 (Mass. Housing Appeals Committee May 26, 2004). In addition, the harm stated must not be speculative. See *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 348, 757 N.E.2d 1104, 1110 (2001).

All of the interveners were represented by the same attorney and offered one expert witness, a registered civil engineer in the Commonwealth of Massachusetts, who is an expert in the fields of civil engineering, traffic analysis, and planning. Tr. VI, 101. In addition, the proposed interveners subpoenaed a commercial loan officer for the Norwood Cooperative Bank to testify on the issuance of the project eligibility determination. Tr. VI, 10.

1. Motion pursuant to 760 CMR 30.04(2)

The first motion was made pursuant to 760 CMR 30.04(2), by Ms. Eileen White, an abutter,

Northwest boundary and to the northwest of the wetland area.[2] See Exh. 19, 19A. The memorandum further states that the Board's decision identifies a real and present threat of flooding onto abutting properties due to the extent of wetlands, the fact that the applicant failed to perform standard on-site soil evaluations, and the fact that the locus is within the Town's floodplain, watershed and water resource protection districts and is within an ACEC.

A review of the Board's decision, admitted as Exhibit 1, does not support Ms. White's allegations. Although the decision does state that the project area is within the Town's floodplain, watershed, and water resource protection districts and within an ACEC,[3] the Board did not state that the Trust failed to perform required soil testing or that it believed that the project had the potential to subject abutting lands to flooding.[4] None of these arguments were addressed in the Joint Post-Hearing Brief.

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2. Exhibit 19 shows four existing homes along Adams Road in the northwest corner of the plan. The proposed interveners' expert witness testified he entered Ms. White's property as part of his review, but was unable to state which one was Ms. White's residence. He indicated during the hearing that he believed it was one of the top two northern most residences identified on sheet 1 of 10, of Exhibit 19. Tr. VI, 171. He later stated he thought it was one of the middle two residences shown on the plan. Tr. VI, 179. However, no final determination was made on the record that identifies the exact location of Ms. White's residence.

3. The Board's decision only includes four findings. It appears that Ms. White bases her claim on Finding No. 2 of the decision, which states "The Project is located within the Miscoe, Warren and Whitehall Watersheds Area of Critical Environmental Concern. It is also located within the 100 year flood plain . . . . Construction and new development within the flood plain raises concerns for potential adverse impacts to the public health, safety, and welfare and the resources protected by the designation of the Area of Critical Environmental Concern." Exh. 1, p. 3-4. The Board's finding is directed to a public

During the hearing, the proposed interveners' expert witness testified that because no storm water management system is shown on the drawings for this project, he could not tell exactly where the discharge of water would occur. Tr. VI, 172-173. But as the properties were located immediately adjacent to a wetland area that was downgrade from the project site, "the short term impact of the sedimentation and runoff into the wetlands may affect those wetlands, which would in turn affect the abutting properties." Tr. VI, 172-173. However, the expert witness also testified that he had no information on the existence of wetlands on the abutting properties. Tr. VI, 179-180. The expert witness's brief testimony represents the bulk of the evidence offered by Ms. White on this issue.

In rebuttal, the Trust offered a Location Plan of Wetlands Resources, dated December 4, 2002, which shows that the abutting properties are located outside of the area delineated as wetlands and are actually in an upland area. Exh. 23A. Based on the paucity of evidence offered by Ms. White as to the issue of flooding, along with a failure to address this claim in the Joint Post-Hearing Brief, the Committee finds Ms. White's assertions as to the potential for flooding of her property to be unsubstantiated and therefore speculative.

In regard to Ms. White's generalized concern for the Town's floodplain, watershed and water resource protection districts, and ACEC, these are concerns that were fully addressed by the Board during the hearing. Tr. I, 146-170. Ms. White did not articulate in the Joint Post-Hearing Brief her specific concerns for these resources or how those concerns differed from the

The remainder of the eight-page memorandum fails to provide clarification or support for any of Ms. White's alleged injuries, but instead goes on to make three unrelated arguments concerning the Board's review of the initial application at the local level and why that review was defective. These matters do not specifically affect Ms. White to any greater extent than any other member of the Town.

In the first of these argument, Ms. White challenges the Board's acceptance of the project eligibility letter pursuant to 760 CMR 31.01(1)(b), as she argues that the New England Fund is not a bona fide subsidy program. White Memorandum, p. 2-3 (filed Jan. 24, 2003). This is solely a jurisdictional matter and clearly is not of specific concern to individual residents of the town. Although the proposed interveners did attempt to solicit some testimony on this issue during the hearing, they did not develop this argument in the Joint Post-Hearing Brief, and appears to have been abandoned. Tr. III, 75-76; Tr. VI, 43-48.

Ms. White's second argument is that the Board failed to adequately examine the projects finances and establish an acceptable profit limitation. Even the Board's consideration of these matters should be very limited, since they are primarily within the province of the subsidizing agency. *CMA, Inc. v. Westborough*, No. 89-25, slip op. at 7 (Mass. Housing Appeals Committee Jun. 25, 1992); also see *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass 339, 379, 294 N.E.2d 393, 420-421 (1973). But in any case, they are not of specific concern to this abutter and therefore cannot be the basis of intervention.

municipality's failure to meet its minimum housing obligations, as defined in G.L. c. 40B, §20, will provide compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal." Id., at 366, 413. This argument was not developed during the hearing nor did it appear in the Joint Post-Hearing Brief and is, therefore, deemed waived. See *An-Co, Inc. v. Havehrill,* No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee Jun. 28, 1994) (citing *Lois v. Berlin*, 338 Mass. 10, 13-14 (1958)).

Since Ms. White has failed to demonstrate that she is likely to be substantially and specifically affected by these proceedings, her motion to intervene is denied.

2. Motion pursuant to G.L. c. 30A, § 10A

The second motion was filed on April 17, 2003, and is a request to intervene by eleven people pursuant to G.L. c. 30A, § 10A.[5] No memorandum was offered in support of the motion. Instead, the motion states, "The intervenors [sic] assert their rights to intervene at this time on the grounds that a ruling by the Housing Appeals Committee favorable to the Applicant would adversely affect environmental resources, including, but not limited to: areas designated to be of critical environmental concern (ACEC), ground water, surface waters, wetlands and wildlife resources." Motion, p. 1 (April 17, 2003). The only request for relief was the right to present oral testimony during the hearing. Motion, p. 2-3 (April 17, 2003).

Section 10A of the Administrative Procedures Act permits not less than ten persons to intervene in an adjudicatory proceeding in which damage to the environment, as defined in

already established by 760 CMR 30.04—is the sort of proceeding for which nearly automatic intervention contemplated by G.L. c. 30A, § 10A is appropriate.[6] See *Rugged Scott LLC v. Nantucket*, No. 04-13, slip op. at 5-7 (Mass. Housing Appeals Committee Sept. 17, 2004). And, in any case, the purpose of such intervention is "in order that any decision . . . shall include the disposition of [the] issue [of damage to the environment and the elimination or reduction thereof]."[7] G.L. c. 30A, § 10A.

Full intervention by these persons is unnecessary, because in appeals under the Comprehensive Permit Law, some of the issues typically joined between the parties—the developer and the Board—are environmental issues. Thus, the purpose of § 10A is served in that our hearing process includes the disposition of issues of damage to the environment and, in

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5. The proposed interveners include George Durfee, Alberta Durfee, Debra Socia, Steven Skowronek, Donna Williams, Thomas Richard, Thomas Overdorf, Ellen Onoranto, Kevin Farley, Linda Underwood, and Geoffrey Underwood.

6. There appear to be no reported precedents interpreting G.L. c. 30A, § 10A, that can be of assistance. It is fair to assume, however, that the policy considerations underlying the similar provisions of G.L. c. 214, § 7A, are instructive. Initially, the Supreme Judicial Court interpreted that statute broadly. See *Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 646, 308 N.E.2d 488, 494 (1974). But the Court's more recent interpretation of the law has been increasingly narrow. See *Town of Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 466 N.E.2d 102 (1984); *Cummings v. Secretary of the Executive office of Environmental Affairs*, 402 Mass. 611; 524 N.E.2d 836 (1988); *Town of Wellfleet v. Glaze*, 403 Mass. 79, 525 N.E.2d 1298 (1988); *Town of Walpole v. Secretary of the Executive Office of Environmental Affairs*, 405 Mass. 67, 537 N.E.2d 1244 (1989); also see *Enos v. Secretary of the Executive Office of Environmental Affairs*, 48 Mass.App.Ct. 239, 247 n.13, 719 N.E.2d

addition, there is no reason to believe that the Board will not adequately protect these environmental issues in the case it presents to us.[8] Therefore, their motion is denied.[9]

II. FACTUAL BACKGROUND

The property proposed for development is a parcel of land consisting of approximately 76.58 acres and located at 68, 70, and 72 Adams Road in Grafton, Massachusetts. Pre-Hearing Order, § I-4. In its present state, the property is predominately covered with hardwoods and scattered white pines. Tr. I, 55-56. There is, however, an existing single-family home located in the central portion of the property. Tr. I, 55; Exh. 19-A. The area is zoned for residential use (R40), which requires a minimum lot size of 40,000 square feet, with a minimum of 140 feet of frontage along a road and 90 feet of frontage on cul-de-sacs. Tr. I, 39, 41, 59. It is bounded on the west by Adams Road, to the north by the Massachusetts Turnpike, and to the east by the town line of Upton and Grafton. Exh. 19-A. The Town of Grafton owns the property to the south. Tr. 7, 64. There are four houses abutting the property in the northwest corner of the site. Tr. I, 52-53; Exh. 19A.

The project area lies within the Miscoe, Warren, and Whitehall Watersheds Area of Critical Environmental Concern (ACEC). Tr. I, 91. In addition, it is the headwater of Miscoe Brook Watershed. Tr. I, 55. Wetland resources on the northwestern side of the property include a pond with an associated intermittent brook that goes along the Massachusetts Turnpike and

then meanders southwesterly. Tr. I, 54; Exh. 19-A. There are approximately 10.1 acres of wetlands on the site, which are of two types, a wooded swamp in the southwest corner and a section of wetland meadow in the northwest corner adjacent to the Turnpike. Tr. I, 56-57; Exh. 23A-E.

The proposed project is designed to include the development of 76 single-family homes, comprised of 75 new homes in addition to an existing house located at the center of the project area. Tr. I, 67. The proposed houses are two-story and each with a two-car garage at the ground level. Exh. 28, p. 4. Nineteen (19) of the units will be offered as affordable three- and four-bedroom units. The remaining 56 units will be four-bedroom market rate units. Exh. 28, p. 4.

Although the Board granted the comprehensive permit, the permit contains several conditions that the Trust argues make the project uneconomic. Of these conditions, the developer contests the reduction in the number of units from 76 to 56; requiring the identification of all trees of more than 12 inches caliper, and that the limit of construction shall not extend more than 20 feet beyond the footprint of each building and ten feet beyond constructed roads, drives, drainage features, or other utilities (Condition 18); denial of connection of the project to the municipal water line (condition 26); requiring the submission of plans to the Board of Health prior to issuance of building permits and compliance with any conditions of the Board of Health (Condition 27); posting of a surety (Condition 31); requiring construction and completion of all stormwater management systems prior to any other site construction activities (Condition 41);

continues to be eligible for a comprehensive permit as a limited dividend entity and to revoke the permit if it finds the Trust is not (Condition 66).

Appellant also argues that the Board was incorrect in refusing to waive Bylaw Section 3.2.3.2, requiring a minimum lot size of 40,000 sq. ft. and Section 4.1.3.3 of the Town's Subdivision Rules and Regulations, which deals with road alignment.

III. APPROVAL WITH CONDITIONS

Where the Board has granted a comprehensive permit with conditions, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Pursuant to the Committee's shifting burden of proof, however, the Appellant must first prove that the conditions, in aggregate, make construction and operation of the housing "uneconomic." See 760 CMR 31.06(3); *Walega v. Acushnet*, No. 89-17, slip op. at 8 (Mass. Housing Appeals Committee Nov. 14, 1990). Specifically, the developer must prove that "the conditions imposed... make it impossible to proceed... and still realize a reasonable return as defined by the applicable subsidizing agency...." 760 CMR 31.06(3)(b); also see G.L. c. 40B, § 20.

If the developer meets this burden, the burden then shifts to the Board to prove "first that there is a valid health, safety, environmental, design, open space, or other local concern which supports the conditions and, then, that such concern outweighs the regional housing need."

circumstances which make the installation of the needed service prohibitively costly." 760 CMR 31.06(8).

A. Uneconomic

As indicated above, when a permit is granted with conditions, the burden is initially upon the developer to show that the conditions make building or operation of the housing uneconomic. 760 CMR 31.06(3). One means by which the developer can meet this burden is by showing that it has approached the subsidizing agency and that the agency has indicated that it will not fund the project because of the conditions. See 760 CMR 31.06(3)(c), 31.07(1)(f).

The Trust received a determination of project eligibility for the proposed 76-unit project from the Norwood Cooperative Bank, which is a member bank of the Federal Home Loan Bank of Boston, New England Fund. Tr. II, 149-150; Exh. 16-18. After obtaining a copy of the Board's written decision, the Trust supplied the Bank with a revised pro forma financial statement reflecting the project with the conditions. Exh. 15. The Bank reviewed the revised pro forma and found that the anticipated profit was so low as to create an unacceptable risk to the Bank and that it would not fund the project as conditioned in the Board's decision. Exh. 18.

760 CMR 31.07(1)(f), establishes a rebuttable presumption that requires the Committee to presume that if the subsidizing agency determines that a condition or conditions imposed by the Board make the project uneconomic and issues a response stating that determination, then the Appellant has met its burden of showing the project is uneconomic *unless presented with*

Therefore, in order to overcome the presumption in this regulation, the Board must present evidence to show that the project is still financially feasible as conditioned in its decision. To meet this burden, the Board offered its own pro forma, showing that the project could be built with 56 units and still realize a profit that would be comparable to the Trust's proposal for 76 units. The Trust's pro forma for 76 units showed a profit of 5.6%, or approximately 1.3 million dollars, and the Board's pro forma for 56 units shows a profit of 7.17%, which also roughly equates to 1.3 million dollars. Exh. 6, 14.

However, in order to obtain this equivalent profit projection, the Board either decreased or removed estimated expenditures that are reflected in the Trust's pro forma. It would render the presumption established by 760 CMR 31.07(1)(f), meaningless if we were to accept the Board's pro forma without corroboration. Therefore, we must review the Board's alterations to the Trust's pro forma to determine whether these cost adjustments are justifiable and, as a result, are effective in rebutting the presumption that the project is uneconomic as defined by the regulation. The Board's pro forma differs from the Trust's pro forma in that it shows a decrease in the road costs, removes the marketing costs, increases the sale price of the affordable units, reduces the broker's commission, and includes revenue from the sale of a 56th unit. Tr. II, 157-161.

1. Decrease in Road Costs

According to the Board, Appellant used grossly incorrect estimates for the cost of roadway and utility construction. Joint Post-Hearing Brief at 7. The Trust's pro forma for the

the civil engineer employed by the Trust concurred with its determination and asserted that he had testified that the loop road is 4,100 linear feet and not 5,413 linear feet, as set forth in Exhibit 6 and 15. Joint Post-Hearing Brief at 8. This claim is misleading. Actually, the Trust's civil engineer testified that there were three components to the on-site road including "4,100 unit feet of the loop road, and then we have 700 linear feet of the double barrel, and then we added the paper bush [sic] cul-de-sac of 600 linear feet." Tr. VII, 35; Exh. 6, p.3.

The Trust's civil engineer explained that the cost for construction of the roadway was estimated to be $250 per linear foot and $152 per linear foot for the common driveway. Tr. VII, 36. He also testified that these estimates were based on his collection of costs over 18 years of related experience and in working on hundreds of construction projects. Tr. VII, 34. The Trust's civil engineer testified that he has compiled this information in a database of cost estimates for about six thousand line items. Tr. VII, 34. According to this witness, he keeps the database current by "reference to public records, Newsweekly [sic], and comprehensive data on labor and material costs." Tr. VII, 34. Conversely, the Board's expert witness decreased the road costs by 5%, because, "well, basically, what I did, I felt that $250 a linear foot for roadway is more on the high side . . . and I felt that $152 for a common drive was also high, once again, so I just reduced that by five percent, also."[10] Tr. V, 119-120.

The engineer offered by the proposed interveners testified that the difference between the Trust's and Board's estimation of the linear feet for the on-site road totaled a difference of 1,313 linear feet. Tr. VII, 124. This witness then went on to state that this resulted in the Trust overestimating the road cost by $1,025,000. Tr. VII, 124. However, the Trust established through cross-examination of this witness, that this figure does not correlate in any identifiable way to a cost of $250 per linear foot for 1,313 linear feet of roadway, which is actually a cost of $325,000. Tr. VII, 18-19. The witness could not explain the discrepancy and testified that if it was an error and if it had been carried through the entire pro forma, it would decrease the estimated profit margin shown in the Board's pro forma by $700,000. Tr. VII, 19-20.

Based on the testimony and evidence provided, the Committee finds that the Board failed to establish that the road costs as indicated on the Trust's pro forma are inaccurate.

2. Decrease in Sale Price of the Affordable Units, Marketing Costs, and Broker's Fee

The Board's reasoning for decreasing these cost items is sketchy and not addressed in the Joint Post-Hearing Brief. However, based on the testimony of the Board's expert consultant, it appears that most of these reductions were not based on industry standards, common practice, or even actual cost evaluations, but were adjusted to reflect what he felt to be appropriate costs. Tr. IV, 149-151.

For the cost of the affordable units, the consultant acknowledged that they might be sold at the 70% median, but he "felt that was stepping too far, giving that the applicant had not

income. Based on the Trust's acknowledgement of this standard practice, the Committee expects that the affordable units will be sold at 70% of the statistical area median income in the current instance, and therefore, the Board failed to justify the increase in the cost of the affordable units. See, e.g., *Pyburn Realty Trust v. Lynnfield*, No. 02-23, slip op. at 20-21 (Mass. Housing Appeals Committee, Mar. 22, 2004); *Woodridge Realty Trust v. Ipswich*, No. 00-04, slip op. at 25 (Mass. Housing Appeals Committee, Jun. 28, 2001).

Both pro formas show a marketing cost of $64,000. Exh. 14, 15. The significant difference in the cost of marketing appears to be the cost for furnishing and maintaining a model market rate unit during the term of the development, which accounts for approximately $80,000 difference in the two pro formas. Tr. II, 158. The Board's consultant did not explain the removal of this cost, and the Board did not address this issue in the Joint Post-Hearing Brief.

In his testimony on the reduction of the broker's commission, Mr. Harrison stated, "I felt that given the size of the development and the market of Grafton, that a real estate firm would agree to a less percentage commission if they got the whole project." Tr. V, 150-151. The Trust acknowledges that reducing the Broker's Commission from 5% to 4% has no impact on the overall return of the pro formas, nor is there any proof that 5% is not a reasonable standard fee. Appellant's Post-Hearing Brief at 20.

3. Revenue from the Sale of the 56th Unit

This issue poses a conundrum that was unresolved during the hearings. The parties were

received from the future sale of the already existing 56th unit. Tr. 3, 157, 159; Tr. 4, 11; Appellant's Post-Hearing Brief at 21. During the hearing, the Board did not indicate that it had not included the existing unit in its decision to allow 56 units for the project, nor did it establish that the Trust's claim was incorrect.

To resolve this issue, the Committee will direct that any comprehensive permit issued for this project include the condition that the Trust may not purchase or sell the existing unit that has been argued to be the 56th or 76th unit. See Condition 1(h). Therefore, the Committee finds that there will be no additional revenue from the existing unit, identified as the 56th unit on the Board's pro forma.

4. Other Proposed Adjustments

Additionally, the Joint Post-Hearing Brief presents the arguments that the site acquisition cost is inaccurate and inflated and that the contingency costs are unjustified expenses that should be completely removed from the pro formas. These were arguments raised exclusively by the proposed interveners during the hearing and would be impossible for the Board to support based on the testimony and evidence that it presented at the hearing.[11] The Board's pro forma used a site acquisition value of $820,000 and slightly reduced contingency costs to $727,134.[12] Exh. 14. The expert witness who prepared the pro forma for the Board reviewed and adopted the Trust's

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11. Examination on this issue was conducted by the interveners and does not support a conclusion that the acquisition cost was inaccurate. Tr. IV, 47-56, Tr. V, 134-137. The expert who prepared the pro forma for the Board was asked by the interveners' attorney "Do you know the basis for the $820,000?"

acquisition costs and then added $20,000 to reflect additional carrying costs. Tr. V, 136-137. In testifying, the Board's witness agreed that the inclusion of contingency costs is a standard practice intended to cover the cost of unforeseen events and that he agreed with the inclusion of such costs in the both pro formas. Tr. V, 149.

As the Board did not provide credible evidence that would support reducing the marketing costs and the broker's commission, the increased price of the affordable units, the decrease in the road costs, or the other proposed adjustments, it has failed to provide the necessary evidence to substantiate its claim that its pro forma shows that the Trust can make a reasonable return on a 56-unit project. Therefore, the Board has failed to rebut the presumption established by the letter from Norwood Cooperative Bank refusing to fund the 56-unit project and, as such, the Trust has established that the project as conditioned by the Board's decision is uneconomic. 760 CMR 31.07(1)(f).

B. Local Concerns

As the developer has met its burden of showing that the conditions make the project uneconomic, the burden now shifts to the Board to prove there is a valid health, safety, environmental, design, open space, or other local concern which supports the conditions, and then that such concern outweighs the regional housing need. 760 CMR 31.06(7). As the hearing before the Committee is de novo, only issues actually joined in the hearing and briefed by the parties are before us. *KSM Trust v. Pembroke*, No. 91-02, slip op. at 3 (Mass. Housing Appeals

brief[13] its arguments relevant to Conditions 18,[14] 27,[15] 31(A) and (B),[16] 41,[17] 61,[18] 62, and 66, and Section 4.1.3.3[19] of the Town's Subdivision Rules and Regulations. Therefore, these Conditions and the requirement of this Section will either be stricken or modified as necessary.

This leaves for consideration the reduction of the units from 76 to 56, refusal to waive Section 3.2.3.2 of the Town's Bylaw requiring minimum lot sizes of 40,000 square feet and a frontage of 140 feet, and Condition 26, which precludes connection of the project to the municipal water line. The Board argues that these remaining conditions are consistent with local needs in that they are supported by the Town of Grafton Comprehensive Plan (Plan) and address the unique environmental and planning concerns in this area of the Town.

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13. The Joint Post-Hearing Brief indicates that the proposed interveners' expert witness testified that there was a "rational basis" for these conditions or that they were "feasible." Joint Post-Hearing Brief at 12-14. G.L.c. 40B, §§20-23, states that requirements and regulations must be "consistent with local needs." This is also reflected in 760 CMR 31.06(7), which directs that "in the case of an approval with conditions in which the applicant has presented evidence that the conditions make the project uneconomic, the Board shall have the burden of proving, first that there is a valid health, safety, environmental, design, open space, or other local concern which supports such conditions, and then that such concern outweighs the regional housing need." Therefore, the Board should have argued in its brief how these conditions or denial of waivers address a valid local concern and then explain its reasoning as to why that concern outweighs the regional housing need.

14. Requiring tree identification and limit to the area of disturbance from construction; see *supra* p. 11. Tr. I, 108-111; Tr. II, 50-52; Tr. VI, 109-110.

15. Review by and compliance with requirements of the Board of Health; see *supra* p. 11. Tr. VI, 110-111.

1. Grafton's Comprehensive Plan

This Committee has long held the view that under appropriate circumstances, comprehensive or master plans are to be given considerable weight in determining consistency with local needs under G.L. c. 40B, §20-23. See *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01, slip op. at 4 (Mass. Housing Appeals Committee Sep. 18, 2002); *Silver Tree Ltd. Partnership v. Taunton*, No. 86-19, slip op. at 35 (Mass. Housing Appeals Committee Oct. 19, 1988), aff'd, No. 88-6435E (Suffolk Super. Ct. May 10, 1989); *KSM Trust v. Pembroke*, No. 91-02 (Mass. Housing Appeals Committee Nov. 18, 1991); *Harbor Glen Associates v. Hingham*, No. 80-06 (Mass. Housing Appeals Committee Aug. 20, 1982); *cf.*, *Pondview Glen Assoc v. Melrose*, No. 75-05, slip op. at 11 (Mass. Housing Appeals Committee Aug. 23, 1976), aff'd, 5 Mass. App. Ct. 838, 363 N.E.2d 548; *Planning Office for Urban Affairs. Inc. V. North Andover*, No. 74-03, slip op. at 13-15 (Mass. Housing Appeals Committee May 5, 1975).

In determining how much weight, if any, should be afforded to the Plan, the Committee must consider three questions. First, is the plan *bona fide*? This involves consideration of whether it was legitimately adopted and whether it functions as a viable planning tool in the Town. Next we must consider whether the plan promotes affordable housing. And finally, is there evidence that the plan has been implemented in the area of the site? If the answer to any of these inquiries is no, then we will not consider the plan in making our decision. See *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Sep. 18, 2002).

the Town to update the original 1963 Comprehensive Plan. Exh. 25, p. 9-10. As a result, the new Plan was designed to identify community concerns and to set goals and define a means by which to achieve these goals, including encouraging coordination in the land development process. Exh. 25, p. 10-11. Development of the Plan included encouraging interested citizens to join the Comprehensive Plan Committee, which worked in unison with the Planning Board, consultants, and the community, to develop a common vision for development of the Town. The Plan was adopted and became effective on December 1, 2001.

Chapter 3 of the Plan addresses local housing concerns, including affordable housing. It is unfortunate that the "Goals" and "Policies" statements for this chapter do not include the promotion of affordable housing. Exh. 25, p. 18. In fact, the Plan recognizes that local residents were "more concerned with the rate of growth than they are with the need for housing opportunities for existing residents." Exh. 25, p. 51. Despite this observation, the Plan does attempt to address affordable housing as a local concern. Exh. 25, p. 51. The Plan acknowledges, "The housing that is currently being constructed is all at market prices." Exh. 25, p. 51. But "market price housing is beyond the reach of most current Grafton residents if the assumed guideline is used of allocating no more than thirty percent (30%) of personal income towards housing . . . ." Exh. 25, p. 51. The only affordable housing available in the Town are the 300 units owned and managed by the Grafton Housing Authority for families, elderly, veterans, and disabled. Exh. 25, p. 52. The waiting list for this housing is one to two years.

include this as an affordable housing provision, but the motion was defeated. Exh 26 & 27. The Committee does not find this failure to provide clear-cut options for affordable housing as fatal. However, it does mean that the Plan provides less direction and affords the Town less control over the means by which it must meet its affordable housing obligation for compliance with G.L. c. 40B.

In analyzing the last of the criteria in determining the weight to be given to the Plan, we must consider whether the Plan has been implemented in the area of the site. According to the testimony of the Town Planner, the Plan identifies the eastern portion of Grafton, in which the project is situated, to be preserved as a rural area. Tr. V, 57; Exh. 25, p. 46. In furtherance of this goal, the Town purchased over 100 acres of land directly abutting the southern boundary of the Trust's property. Tr. IV, 75. The Town intends to permit the development of 15-units of market rate housing on a portion of this property, which would be directly adjacent to and accessed off of the existing Adams and Fay Mountain Roads. Tr. IV, 78. The units will be on individual wells and septic. Tr. IV, 79. This minimal development plan will allow the Town to recover some of the cost of the purchase of the land, without the construction of additional roads, while preserving the remaining land in furtherance of the goals identified in the Plan for this area of Grafton. Tr. IV, 79.

More recently, the Town has undertaken the purchase of another 50-acre parcel in this same area of Grafton. Tr. IV, 81. In 1998, the year work began on revising the Plan, a motion to

therefore be given some deference, though not the greatest amount, in our consideration of the housing proposal before us. As this case involves a grant with conditions, it differs from our analysis in *Barnstable*, which involved a denial of a permit based on the argument that the construction of any housing would be inconsistent with the plan on its face, and that the town's planning interest were significant enough to justify the denial. See *id.* Here, the more appropriate argument is that even without a comprehensive plan, there might be local planning concerns with regard to density, setback, and similar matters which the Board could argue are sufficient to support the conditions. The comprehensive plan simply adds weight to those concerns.

2. Number of Units and Waiver of Lot Size and Frontage Requirements

The Board argues that the Plan envisions increasing lot sizes in the eastern portion of Town to reduce build-out and to preserve its character as rural. Exh. 25, p. 33: Tr. V, p. 114-116. The Board also argues that conditioning the development to adhere to Bylaw § 3.2.3.2, which requires 40,000 square foot lot sizes with the 140-foot frontage, complies with the Plan. Tr. V, p. 115-116. Therefore, in order to meet this requirement, the project must be reduced to 56 units, which roughly corresponds to the number of buildable acres available within the project area.[20] Tr. V, p. 83-84.

The density of the proposed project is roughly one unit per acre, which is the same density as that permitted by the Bylaw.[21] Tr. V, 55-56; Exh. 24, p. 27-28, 41. Therefore, the

primary local concern argued by the Board is not truly a density issue – how many units of housing should be permitted on the site – but is instead an interest in preserving the "rural" character of the area. This, however, means that the Board's refusal to waive the local lot size and frontage requirements is in effect contrary to the intent of the Plan. According to the Plan, one of the means by which to reduce build-out is to

> Require 'flexible development' in the eastern portion of Town, or, if this concept is not used, require larger lots. Flexible development, a form of cluster zoning, is a type of residential development permitted by the Grafton Zoning Bylaw. In this form of flexible development, single-family dwellings are clustered into groups separated from each other and from adjacent properties by permanently protected open space.

Exh. 25, p. 33.

As also indicated in this section of the Plan, the Grafton Zoning Bylaw Section 5.3, provides for a form of cluster development. Exh. 24, p. 65. Section 5.3, allows the clustering of single-family dwellings units together into one or more groups on the lot, and the clusters are separated from each other and adjacent properties by permanently protected open space. Exh. 24, p. 65. The project as proposed by the Trust, incorporates a cluster design with construction of the units on approximately 20,000 square foot lots, which is "similar to [the] Grafton Zoning Bylaw which permits a cluster design or 'flex' or flexible development." Tr. I, 39; Exh. 24, p. 67. Clustering of the units will result in "nearly 45 percent open space on the 76 acres." Tr. I, 41.

Therefore, although the concern for maintaining the rural character of this portion of the

Section 3.2.3.2 of the Town's Bylaw is both contrary to the intention of the Plan and does not outweigh the regional need for housing. G.L. c. 40B, § 20; 760 MR 30.02.

3. Water Connection

The Trust argues that connection to Town water is a critical design component of the open space cluster plan as some of the lots will be too small to meet the 100 foot separation between wells and septic systems as required by Title 5.[22] Tr. I, 74. Despite this argument, the Trust's expert witness testified that it was possible to situate 76 wells and 76 septic systems on the lots and maintain the necessary 100-foot separation. Tr. II, 64-67. According to this witness the project had been designed around the premise that Title 5 allows for the consideration of the "total amount of acreage, divide [by] the total number of lots, and . . . yield an average of one acre lot[s] . . . ." Tr. II, 69. He further testified that the local Board of Health has an alternate interpretation of Title 5 and 310 CMR 15, which requires that "lots [which] are less than [a] Title 5 acre, which is 43,506 square feet to 40,000 square feet . . . be limited in [the] number of bedrooms." Tr. II, 69. According to the Trust, the Board of Health's interpretation makes cluster zoning impossible without access to municipal water. Therefore, the Trust asserts that it is necessary to extend the municipal water line the 2.77 miles[23] to reach the project area. Tr. II, 112.

The Board argues that the extension of the water line is contrary to the Plan, because it will have the secondary effect of promoting development. According to the Town Planner, "the extension of water and sewer into . . . these rural areas . . . would open up areas that traditionally

have not been thought of [as] developable or would have some development constraints, running the utilities out there create[s] the likelihood of development or more dense development than what was envisioned for that area." Tr. IV, 96, 138. The Plan states that one way to limit build-out is to "Limit the extension of water and sewer service to agricultural land and watershed protection areas." Exh. 25, p. 33. The other developments in this area of Grafton required on-site wells. Tr. IV, 80, 85, 87.

In the summer of 2000, the Town obtained an ACEC designation for this area of Grafton in compliance with the goals of the Plan for the protection of local resources. Exh. 25, p. 104, 107. In recognition of the importance of achieving this goal, the Plan includes the following excerpt for this area and specifically the Miscoe Brook Watershed:

> Grafton's Miscoe Brook Watershed has recently been designated as an 'Area of Critical Environmental Concern' (ACEC) in conjunction with the Warren Brook Watershed in Upton. The area of nomination, 8,700 acres, the 26th officially designated such state area, includes 220 acres of meadows, marshlands, forests, and farmlands, and is now known as "the Miscoe, Warren and Whitehall Watersheds Resource Area." The Great Meadows, consisting of "great cypress swamps and natural hay meadows" is of tremendous ecological value to Grafton and to the region. The Town's purchase of and then minimal development of the Hennessy parcel will help to protect the area's integrity. The Town should pursue further land acquisition in the area.

Exh. 25, p. 104.

The Trust offered expert testimony of an environmental consultant to support its assertion that the water line extension will not have an adverse impact on any nearby environmentally sensitive properties and that there is only limited potential for build out along this route. Tr. VII,

properties adjacent to the route indicated for the water line extension defined a maximum build-out of 116 lots as limited by current zoning and natural resource constraints. Tr. VII, 58, 65. However, the Committee is not persuaded by the witness's testimony, as she conceded that her analysis did not take into account possible additional G.L. c. 40B developments, which allow for greater density than normally permitted by local zoning. Tr. VII, 90.

The Committee finds that Condition 26 is consistent with local planning as reflected in the Plan, in that it limits the extension of local water service over a long distance within an area designated for preservation of open space and recreation. This limitation does not preclude development in this area of the Town, but will allow for the systematic regulation of the extension of water service to this area in balance with the goal of the Plan to preserve the rural character of this portion of the Town, as well as to provide for open space and recreation for all of the members of this community.

As the Town has engaged in careful and thoughtful planning, has set forth viable goals and identified means by which to achieve those goals and shown that it has actively pursued the goals as set forth in the Plan in attempting to preserve the rural character of this portion of Grafton, the Committee finds that the condition restricting extension of the Town water line is a valid local concern which outweighs the regional housing need. However, requiring adherence to this condition does not preclude the construction of affordable housing on this site by the Trust. Instead, it results in a balancing of interests, as identified in the Plan with the need for

and promotes additional green space.[24] However, the project must comply with Title 5, including 310 CMR 15.216(2), but it is exempt from any and all local interpretations requiring 10,000 square feet of lot area per bedroom for each individual house lot. See Condition 1(b).

IV. G.L. c 30, § 61 HOUSING APPEALS COMMITTEE FINDINGS

On April 30, 2004, the Secretary of Environmental Affairs issued a Certificate stating that the project's Final Environmental Impact Report (FEIR), dated March 15, 2004, complied with the MEPA statute and regulation.[25] The MEPA statute requires, in part, that state agencies "review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and . . . use all practicable means and measures to minimize damage

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24. A significant change in lot layout would require notice pursuant to 760 CMR 31.03(3), but might be desirable to both parties. If such a change were denied, the developer could still choose to proceed with the design presented to the Committee.

25. The project falls within a portion of an ACEC. Tr. I, 43-44. This designation does not preclude the development of housing, but instead requires a more lengthy review process under the Massachusetts Environmental Protection Act (MEPA). Tr. VII, 101. See also *Transformations, Inc. v. Townsend*, No. 02-14, slip op. at 15 (Mass. Housing Appeals Committee Jan. 26, 2004). The Trust has submitted all information to this additional review and received a "Certificate of the Secretary of Environmental Affairs on the Final Environmental Impact Report." Exh. 48. As stated in that document,

> MEPA is not a zoning process, nor is it a permitting process. MEPA review does not in itself result in any formal adjudicative decision approving or disapproving a project. The purpose of MEPA review is to ensure that a project proponent studies feasible alternatives to a proposed project; fully discloses environmental impacts of a proposed project; and incorporates all feasible means to avoid, minimize, or mitigate Damage to the Environment as defined by the MEPA statute. After completion of the EIR process, the state permitting agencies must then issue substantive decision on whether or not to permit those aspects of the project within their respective jurisdictions. If permits are

to the environment . . . . Any determination made by an agency of the commonwealth shall include a finding that all feasible measures have been taken to avoid or minimize said impact."

In compliance with this requirement, the Committee has made the following Findings for the High Point Acres Comprehensive Permit Project (EOEA #13037) in accordance with G.L. c. 30, § 61, 760 CMR 31.08(3)(b), 301 CMR 11.01(4)(c) and 11.12(5):

The project consists of the following proposed alterations to the site:

(1) Development of 76 single-family homes in a cluster design, on lots ranging in size from 38,000 square feet as a maximum and 12,000 square feet as a minimum. Tr. I, 70.

(2) The development will result in the creation of a total of 8.95 acres of impervious surface.

(3) The project will use 31,350 gallons of water per day. Exh. 9.

(4) The removal of trees from the immediate construction area. Tr. I, 100-101.

(5) The Trust has agreed to off-site improvements, which include removing 5 trees, and lowering a portion of existing stonewalls to increase site distances on Adams Road. Tr. I, 69. No other effect is anticipated on stonewalls along this scenic roadway. Tr. 5, p. 89-90.

(6) Some construction activities will be within the Riverfront Area, Bordering Land Subject to Flooding and the buffer zone to Bordering Vegetated Wetlands. Specifically the project requires a road crossing through the Riverfront Area and a portion of the 100-year floodplain associated with Miscoe Brook. Tr. I, 77-85.

2. **Water Supply:** Extension of the municipal water line to the project site, a distance of approximately 2.77 miles, is contrary to the Grafton Comprehensive Plan, and would promote unregulated development in an area identified by the Town for preservation of open space and for recreational purposes. On-site wells are required to mitigate this concern. See *supra* pp. 26-28 of this decision; see also Condition 1(a) and 1 (b).
3. **Wastewater:** The project will be constructed in a manner that complies with Title 5. See *supra* pp. 26-28 of this decision; see also Condition 1(b).
4. **Visual Impacts:** The project as proposed will maintain the nature, topography, tree cover and character of the property, pre-development, using inherent features of the land to create a natural environment with a minimum of excavation, earth moving and tree removal to the greatest extent possible and shall minimize cutting within 100 feet of the property lines adjacent to the Town's conservation land and the Massachusetts Turnpike Authority. See Condition 1 (a). The project as proposed will preserve approximately 34 acres of open space. See *supra* pp. 25 of this decision; see also Condition 2.

This project will be granted a Comprehensive Permit subject to the conditions as issued by the Board, except for those conditions that have been altered or removed in this decision by the Housing Appeals Committee. Based upon its review of the MEPA documents and the Committee's regulations, the Committee finds that the terms and conditions to be incorporated into the agency actions required for this project will avoid damage to the environment to the

complete summary of the potential impacts and mitigation measures associated with the project as proposed is provided in the FEIR.

In addition to the Comprehensive Permit, the project will require Orders of Conditions from the Grafton Conservation Commission, and possibly a Department of Environmental Protection (DEP) Superceding Order of Conditions, if the local Order is appealed; a DEP Stormwater Pollution Prevention Plan and Compliance with Stormwater Management Policy; a DEP 401 Water Quality Certificate; and an Army Corps of Engineers Programmatic General Permit. In addition the project must comply with the National Pollution Discharge Elimination System (NPDES) General Permit for Stormwater discharges from a construction site. The Committee finds that these additional reviews will further minimize the projects environmental impacts.

The Committee's Docket Clerk is directed to file a copy of this decision with the MEPA Office pursuant to 301 CMR 11.01(4)(c)(3) and 11.12(5).

V. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit by the Grafton Board of Appeals. Further, the Committee concludes, pursuant to G. L. c. 40B, § 23, that certain of the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue a revised decision

1. The comprehensive permit shall be for 76 units of single family housing with 19 affordable units, with on-site wells and septic, and shall conform to the application submitted to the Board, Exhibit 1, except as provided in this decision, and specifically:

(a) Condition 18 is to be deleted and replaced with: The Trust shall maintain the nature, topography, tree cover and character of the property, pre-development, using inherent features of the land to create a natural environment with a minimum of excavation, earth moving and tree removal to the greatest extent possible consistent with the final plans. The Applicant shall minimize cutting within 100 feet of the property lines adjacent to the Town's conservation land and the Massachusetts Turnpike Authority. Trees shall be preserved unless it is necessary to remove them for construction and they are within the limits of construction. The limit of construction shall not extend more than 20 feet beyond the footprint of each building excluding accompanying grading and ten feet beyond constructed roads, drives, drainage features or other utilities excluding accompanying grading.

(b) Condition 27 is to be deleted and replaced with: The on-site wells and septic systems must comply with Title 5, including 310 CMR 15.216(2), but are exempt from any and all local rules, regulations and practices governing aggregation plans including, but not limited to the Board of Health's practice of requiring 10,000 square feet of lot area per bedroom for each individual house lot. The Board of Health shall permit a Facility Aggregation Plan where the design flow discharge of 440 gpd is calculated across the facility and non-facility credit land, resulting in a

3.3.8.1), Covenant (Section 3.3.8.2) or Tri-Partite Agreement with accompanying surety (Section 3.3.8.3).

(d) Condition 41 is to be deleted and replaced with: With respect to each of the three construction phases of the Project, the Applicant shall construct and complete all stormwater management systems for the particular phase, prior to construction of any homes for that particular phase.

(e) Conditions 61 and 66 shall be deleted.

(f) Condition 62 is to be replaced with 760 CMR 31.08(4).

(g) Section 3.2.3.2 and 4.1.3.3 of the Town's Subdivision Rules and Regulations are waived to the extent that lots need not be a minimum of 40,000 square feet, but shall conform to the lot sizes as shown of the plan; and the tangent for the road alignment is reduced to 100 feet.

(h) The exiting unit shall not be purchased or sold by the Trust.

2. The development shall be constructed as shown on "40B Comprehensive Permit Plan, 76 Residential Homes, Adams Road, Grafton, Massachusetts," prepared by Patrick c. Garner Co., Inc., and dated July 6, 2001, with a final revision date of August 28, 2002. Exh. 19. The permit will be for the construction of 75 units of mixed-income affordable housing, with 19 units being sold as affordable units according to the guidelines established by the funding agency and in compliance with FHLBB NEF guidelines.

3. To assure a "window" of affordability, the maximum sale price for the affordable units

interest rates offered for 30-year fixed rate loans with down payments of 5% of total cost shall be applied, and current real estate tax rates in the municipality in which the unit is located shall be used.

4. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, § 23 and 760 CMR 31.09(1), this Final Decision shall for all purposes be deemed the action of the Board.

5. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the Comprehensive Permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of this subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency

that conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G. L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Issued: December 10, 2004

Housing Appeals Committee

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Glenna J. Sheveland, Counsel